M W Becker
Assistant Vice-President
Labour Relations

7550 Ogden Dale Road SE
Calgary Alberta
Canada T2C 4X9

T 403 319 6754

myron_becker@cpr.ca

June 26, 2015

VIA REGISTED MAIL AND E-MAIL

Ken Deptuck
EFAP-SAC C-Chair
TCRC-MWED
#1, 2775 Lancaster Road
Ottawa, ON K1B 4V8

Steve Hadden
President
USW
2360 de Lasalle, Room 202
Montreal, QC H1V 2L1

Doug Fisher
Canadian National Railway Company
935 de la gauchetiere ouest
Montreal, Quebec
H3B 2M9

Roland Hackl
Vice President
TCRC
1710-130 Rue Albert Street
Ottawa, ON K1P 5G4

Barry Kennedy
President, National Council
Unifor
14923 – 107 Avenue
Edmonton, AB T5P 0X8

RE: Canadian Railway Office of Arbitration and Dispute Resolution (CROA&DR)

All,

In accordance with Paragraphs 22 and 23 of the May 20, 2004 Memorandum of Agreement (MOA) establishing the Canadian Railway Office of Arbitration and Dispute Resolution (CROA&DR), I regret to inform you that Canadian Pacific Railway Company has no choice but to inform you that we will be withdrawing from the CROA MOA and therefore our membership from CROA. We believe that despite our efforts to work to reform CROA over the last several months, we have no choice but to take this drastic but necessary step. The Company has attempted to address much needed reform to the current CROA setup. Unfortunately, CP's efforts to help fix a broken system have been met with substantial resistance.

In addition, the Company was most disappointed when it became apparent that no other industry partners or other federally regulated industries expressed any interest in having the Minister of Labour review the dispute resolution system in federally regulated industries. That said, we look forward to working with each of you to set up an expedited process of mediation and arbitration along the lines of what CROA was intended to be, that will serve all parties effectively.

In accordance with Paragraphs 22 and 23 of the May 20, 2004 Memorandum of Agreement and its terms, we are providing our notice dated June 26, 2015 to withdraw from the CROA MOA and therefore our membership from CROA. This notice is more than the required period of at least sixty days' notice and, by the terms of the MOA, is to take effect on August 31, 2015. Notwithstanding our right to exit CROA under the terms of the MOA, we are fully prepared and committed to continue our participation in CROA until December 31, 2015. Between now and December 31, 2015, we believe that we can either work with you to reform CROA or in the alternative, find better ways to manage disputes with each of the unions individually outside of CROA. Obviously, the CROA Committee would have to approve to extend CP's withdrawal from CROA from August 31, 2015 to December 31, 2015.

This decision was not arrived at without some serious consideration on our part. While we are not compelled by the CROA Rules to explain the reasons for our departure, in the interests of fairness, I feel it necessary to provide you some of the Company's many reasons below:

CROA

The fundamental difference in interpretation of parties' rights under the CROA MOA is one reason that CP has decided to exit CROA.

As you know, last year, CP decided not to renew the appointment of one of the arbitrators of this Office, Arbitrator Michel Picher. Notwithstanding our exercise of our contractual rights under the MOA, the worst motives were attributed to the Company. The Unions seemed to make it clear that the Company was, unlike any other party, not allowed to exercise its rights under the CROA Memorandum of Agreement whereas it was appropriate for the Unions to do so.

FAILURE TO AGREE TO RECORDED MEETINGS

As you are aware, when the CROA Administrative Committee was in the process of discussing the appointment of new arbitrators in March and again in August of 2014, minutes were created. Once the minutes were created, there were eventually several different variants of the minutes in circulation with different union members of the CROA Administrative Committee adding their own comments or disagreement with the Minutes. In some cases, as was evident at the CIRB Hearings in April 2015 on the issue of the Company's decision not to renew the contract of Arbitrator Michel Picher, there were multiple versions of CROA Committee Minutes for meetings on the same day. One of the many versions of the August 2014 Minutes of CROA is attached at Appendix 1.

What I understood from the testimony given by Doug Fisher of CN was that in the past former CROA Secretary, Collette Newton kept recorded verbatim minutes in the event that there were discrepancies in the recorded minutes. A reversion to this kind of system or reliance upon such a system would go a long way to protecting each party's interests (both Company and Unions). The Company's insistence on reverting to a system of verbatim minutes was designed to protect each party's rights to state their position and to provide each party an accurate record of what they had indicated on the record.

Given that the parties may wish to have a discussion "off the record" from time to time, the Company was and is also prepared to make exceptions at times to a strict adherence to verbatim minutes.

HEARING PROCESS

The original intent of CROA was to use an expedited process where each case could be heard within an hour and a decision rendered by the CROA arbitrator. This was the original intention of CROA and this fact is reflected very well in a paper by Arbitrator Michel Picher, which I am sure all of us have seen at some point or other in the past. I have attached the paper at Appendix 2 for your reference; if Arbitrator Picher has laid out a map of what CROA was, in our respectful view, it has been transformed into a combative legalistic process that would be hardly unrecognizable to the founders of CROA. Mr. Picher's paper speaks to lay representatives of both the Unions and the companies presenting cases on behalf of their clients. The paper also speaks to how cases are predominantly argued by Labour Relations experts or by lay representatives. The article also speaks to how most cases are completed within a 1 hour time frame. Almost without exception, every case advanced by the TCRC in the last several years has been argued by counsel reading their briefs and making both argument and lengthy introductory background comments. While a party may certainly have cases which require lawyers, it is our belief that for the most part, while important to the individuals may not warrant legal counsel on either side of the ledger.

I also note that John Stout, a former Union side lawyer, and one of the arbitrators whose continued appointment was rejected by the Committee, had suggested that the parties submit briefs in advance and that the arbitrators read those briefs prior to the hearing. This would have eliminated the need for hearing with counsel or lay representative to read through a brief and instead would force counsel or lay representative to emphasize a few points and leaving it up to the arbitrator to read the brief prior to the hearing. In some respects, this approach is no different than that taken by judges in civil court motions. Parties submit their briefs in advance and judges are generally prepared in advance. It is the Company's respectful view that adopting a framework that seems to work in non-complex civil litigation motions and as suggested by Arbitrator Stout would allow for expedited hearings within a 75 minute or slightly longer time frame.

Regrettably, despite the Company's best efforts it appears that this proposal was "dead on arrival" without parties even suggesting an extension of the time frame or any other constructive solution. And of course, the parties always reserve the right to extend their hearings if advance notice is given.

STREAMLINED PROCESS

There was also no consensus on streamlining the arbitration process. Nor was there a consensus on using an expedited arbitration approach as is done at Canada Post for some of its cases. Canada Post as you know has successfully used a streamlined system of expedited arbitration in parallel to a lengthier system with counsel for many years. I have attached a copy of a section of the Canada Post collective agreement at Appendix 3.

LOCATION

As you know, the Company has been based in Calgary for almost twenty years. Windsor Station was sold several years ago and the Company has eliminated most of its workforce in Quebec aside from a few operations employees. In that respect, the Company finds it tremendously difficult to understand why representatives of the company and other parties are forced to make monthly trips to Montreal for hearings when those hearings are only convenient to parties who reside or are corporately situated in Montreal. It is confusing to the parties that agreement could not be made on a distribution of hearings in the East and West. In fact, by acceding to requests from individual arbitrators that hearings be held in Toronto for several months in a row, the CROA Committee is essentially setting up a system of ad-hoc arbitrations in random

locations. This sort of ad-hoc location specific, ad-hoc arbitrator specific, ad-hoc length and duration process is the antithesis of what the founders of CROA intended. In our view, such a process defeats one of the tenets of CROA and what has recently been agreed to by the Committee. Moreover, having cases in Toronto does not address the issue that given the Company is based in Calgary it stands to reason that some cases are also held in Calgary. Surely this cannot be a contentious matter and surely one that the Company's own union locals can support given the reduction in their travel costs.

GRIEVANCE BACKLOG REDUCTION

I do note that the Company finds it somewhat counterproductive to be brought to task at various CIRB hearings for failing to deal with grievance cases in an expedited manner when in our view some of the Unions take a significantly long time to bring their cases forward. This results in a backlog, which at hearings only the Company is blamed for causing.

So, while it may seem counterintuitive to you that exiting CROA would in fact reduce the backlog of cases awaiting resolution, we believe this is exactly what will happen if the parties have a better system for dispute resolution. For example, we have agreed to Arbitrator Tom Hodges to deal with UNIFOR cases for two days per month to reduce the grievance backlog. This is a constructive solution and will reduce the case load for UNIFOR.

Similarly, we believe that setting up a system with each of the Unions will reduce the number of outstanding cases for resolution. For example, we have already agreed with the Teamsters Canada Rail Conference to set up an expedited mediation process under the auspices of Steve Samosinsky of Federal Mediation and Conciliation Services. We believe that this process again will reduce the number of cases that are ultimately referred to CROA or a CROA style arbitration process. We believe that not every case must be before an arbitrator and that key cases can be resolved by way of mediation as well.

NEXT STEPS

In the next few weeks, Dave Guerin or I will be approaching each of you to either work to reform CROA or set up individual arbitration processes that would apply only for grievances between your Union and CP. If the Committee is agreeable to extending CP's exit from CROA until December 31, 2015, we will continue to use CROA until that time. Clearly our intention is to have a process which can work for all parties. In closing I look forward to working with each of you to reform CROA or set up an alternative style arbitration process which I hope will more closely reflect the original intent of CROA.

Sincerely,

Myron Becker
Assistant Vice-President
Labour Relations

cc: April Dumas
CROA&DR

Appendix 1

MINUTES FOR THE MEETING OF
THE ADMINISTRATIVE COMMITTEE OF THE
CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION
WEDNESDAY AUGUST 6th, 12th, 18th 2014
MONTREAL CROA OFFICE

Committee Members:

Doug Fisher – CNR
Myron Becker – CPR
Barry Kennedy – Unifor
Paul Boucher -- TCRC
William Brehl – TCRC-MWED
Steve Hadden -- USW

Conference ID: .....9369224#

Local Dial-in number: 514-392-3301

Toll-free Dial-in number: 1 866-392-3211

WEDNESDAY AUGUST 6th, 2014

- ..... MGP questioned if 2% was the average increase.
- ..... CPR able to withdraw offer .
- ..... No consensus to renew Mr. Picher's contract.
- ..... No consensus on the rate of increase.
- ..... New list of Arbitrators to be sent to General Secretary by Monday August 11.
- ..... TCRC's Position :
  On August 6th 2014, it was CN and CP who believed there was not consensus on Mr. Picher. The unions disagreed with that position of the Company's and stood by the position that we did have consensus. This needs to be reflected in August 6th minutes. That issue in the minutes as written is not accurate in my opinion.

TUESDAY AUGUST 12th, 2014

- ..... Christine Schmidt Yes to October.
  Not available for September, March, June,
  Yes for 2 days in November.
  Yes for 1 day in April & May
- ..... MGP advised D. Fisher he is opening his dates for arbitration to other clients.
- ..... The Game Stoppers / Veto's :
  UNIFOR : Moreau, Jones, Abramowicz, Sims

  MWED: Jones

  USW: Moreau

  CPR: Wetherhill, Kaplan

  CNR: Wetherhill, Pineau, Hodges, Ponak

TCRC: Moreau, Jones, Sims, Abramowicz, Bendel, Pam Picher, Flynn, Martin, Hodges, Ponak

- ..... No consensus call adjourned until Monday, August 18th.

MONDAY AUGUST 18th, 2014

- Christine Schmidt advised she is reducing her workload, but will make herself available for October.
- Consensus to explore the following arbitrators: K.O'Neil, C. Albertyn, M. McKeller, M. Cummings.

- *we would consider the list of arbitrators as "additional arbitrators" and not "replacement arbitrators". From TCRC-Paul Boucher*
- No consensus on the above listed arbitrators.
- September hearings postponed until October.
- **TCRC-MWED Position** at each of the meetings :
  I will go on record to state again, as I did on each of the August calls (even though it is not captured in your minutes), that I believe that we had consensus in March to renew M. Picher's contract and that he had accepted the offer.

  Therefore it is my position that we have a binding verbal contract with M. Picher for the next year at a 2% increase.

- **TCRC Position** at the August 18th meeting:
  I had made it clear that our position was that we had consensus in March to renew Mr. Picher's contract and that he had accepted the contract for September 1st 2014, and as such, it was to be adhered to.

Appendix 2

Michel Picher

130 Slater Street, Suite 200
Ottawa ON K1P 6E2
Tel: (613) 236-0485
Fax: (819) 827-7621
Email: picherarb@sympatico.ca

Primary Jurisdiction

Ontario

Arbitration Practice

1976

Languages

English, French

Sectors/Industries Jurisdiction

Federal, Provincial

Education

B.A., 1967, Colby College; LL.B., 1972, Queen's University; LL.M., 1974, Harvard Law School.

Background

Member of Board of Governors, National Academy of Arbitrators; Arbitrator of Seniority Lists for Canadian Airline Pilots Association, re: Air Canada, Air Nova, Air Alliance, Air Ontario, Air B.C., N.W.T. Air, 1994; Member, consultative committees of Ontario Law Reform Commission on Employment Disputes Adjudication and on Drug Testing in the Workplace, 1992-93; Salary arbitrator, Major League Baseball, 1992-93; Adjudicator of Drug Infraction Suspension Appeals for Sport Canada and the Centre for Drug-Free Sport; Law Professor, University of Ottawa, 1974-76.

Mediation

Collective agreement negotiation; mediation/arbitration.

Standard Fees for Cancellation

Notification received more than one month prior to hearing, no charge except for hearing room cancellation charges and/or file administration fee; notification received within one month of hearing, $1,840.00; if date of cancelled hearing is used for another hearing, $0.00, except for hearing room cancellation charges and/or file administration fee; s.49, O.L.R.A., where date scheduled less than three weeks prior to hearing, $600.00; settlement during course of hearing, $4,600.00 (may vary depending on time and circumstances); File Administration Fee: Where a case is cancelled or withdrawn, and a substantial time has been expended in consultation, correspondence, scheduling of hearing, notices, et cetera, up to $900.00; Daily rate for grievance arbitration Is $4,600.00.

Lists and Panels

Ontario Ministry of Labour; Labour Canada; Ontario Police Arbitration Commission; Canada Post/C.U.P.W.; Canadian National Railway, Canadian Pacific Railway, Ontario Northland Railway, VIA Rail/I.A.M., I.B.E.W.,

T.C.R., UNIFOR; Ontario Hydro/Power Workers' Union; La Cité Collégiale/S.E.F.P.O.; Memorial University of Newfoundland/M.U.N.F.A.; University of Moncton/A.B.P.P.U.M.; Halifax Employers' Association/I.L.A.; University of New Brunswick/A.U.N.B.T.

Related Adjudication Experience

Chair, Board of Inquiry, Ontario Human Rights Code, 1994-98; Adjudicator, Ontario Education Relations Commission; Vice-Chair, Ontario Grievance Settlement Board, 1983-90; Vice-Chair, Ontario Labour Relations Board, 1976-83; ADR: environment and public interest disputes.

Associations

National Academy of Arbitrators; Ontario Labour-Management Arbitrators' Association; Association des juristes d'expression français de l'Ontario; Law Society of Upper Canada.

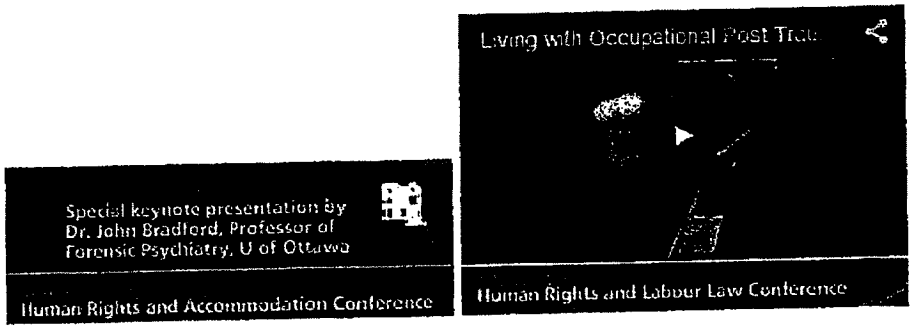
Arbitration Awards on CanLII

For Arbitrator Picher's awards on CanLII, click here. Note: CanLII, the Canadian Legal Information Institute, offers free access to the full text of recent awards by this arbitrator.

Related Publications

"*Functus Officio*: The Retention of Jurisdiction In Canadian Labour Arbitration", Labour Arbitration Yearbook, 2004, (Toronto, 2004), (Republished in Labour Arbitration Yearbook, 2014); "Presidential Address" – Chicago, May 2009, Proceedings of the Sixty-Second Meeting of the National Academy of Arbitrators 2009, BNA Books; "Defining the Scope of Arbitration: The Impact of Weber: An Arbitrator's Perspective", Labour Arbitration Yearbook, 1999 – 2000, Vol.I (Toronto, 2000); The Arbitration Profession in Transition: A Survey of the National Academy of Arbitrators (with Ronald L. Seeber and David B. Lipsky) Cornell Studies in Conflict Resolution, Spring 2000 (for the National Academy of Arbitrators and Cornell/PERC Institute on Conflict Resolution); "Truth, Lies and Videotape: Employee Surveillance at Arbitration", in Canadian Labour & Employment Law Journal, 1998, Vol. 6, No. 3.; "The Problem of Delay at Arbitration: Myth and Reality" (with Ellen E. Mole), in Labour Arbitration Yearbook, 1993, Vol. IV, Kaplan, Sack and Gunderson, eds. (Toronto, 1993); "Un aperçu de l'oeuvre de la Commission des relations de travail de l'Ontario, 1980 à 1991," Actes du colloque du Droit social et du travail, Université du Québec à Montréal, juin 1991; "The Canadian Railway Office of Arbitration: Keeping Grievance Hearings on the Rails" in Labour Arbitration Yearbook 1991, Vol I, Kaplan, Sack and Gunderson, eds. (Toronto, 1991); "The Mediator's Perspective, Canadian Environmental Mediation Newsletter, January 1986; "The North Simcoe Landfill Dispute: An Initiative in Environmental Mediation", Spring 1986 (Proceedings of the Symposium on Environmental Mediation, Ontario Society for Environmental Management, Toronto, March 1985); "Adjudicator, Administrator or Advocate? The Role of the Labour Board in Judicial Review Proceedings" (The Canadian Bar Review, March 1984); "Alternatives Under NEPA: The Function of Objectives in an Environmental Impact Statement" (Harvard Journal on Legislation, 1974); "The Separation Agreement as an Unconscionable Transaction: A Study in Equitable Fraud" (Queen's Law Journal, 1973)

Arbitrators are invited to send awards to decisions@lancasterhouse.com. In an effort to facilitate access to justice, Lancaster House forwards all awards it receives from arbitrators to CanLII.



1991

The Canadian Railway Office of Arbitration: Keeping Grievance Hearings on the Rails

MICHEL G. PICHER*

The Canadian railway industry has developed a simplified and accelerated system of arbitration that has been used effectively for close to 25 years. With the cost and delay of ad hoc grievance systems a subject of growing concern, the system used in the railway industry is worthy of serious study, Arbitrator Picher argues. This article examines the Canadian Railway Office of Arbitration (CROA) from its early development to its present-day structure. In deciding on the structure of the office, the parties decided that familiarity with railroad practices and consistency in the interpretation of a myriad of collective agreements were better achieved through the use of a single permanent arbitrator. Picher discusses the hearing procedures, which focus on the merits of grievances. By forcing the parties to ascertain what material facts are not in dispute, the CROA system limits the time and cost of the hearing. The brief hearings even in complex discipline cases can be explained by the detailed pre-hearing fact-finding processes that provide a form of pre-discipline due process to employees. A comparison of CROA case outcomes with the outcomes of labour arbitration generally reveals no significant variation. The savings in time are substantial; although the processing of grievances takes roughly the same time under both systems, CROA cases are heard in one to two hours, at the rate of five to seven cases a day. Those in the labour relations community who have concerns about the cost, delays, accessibility, and overall efficiency of the system of arbitration should appreciate why employers and unions in the rail industry share the conviction that the CROA system is a better way to run a railway.

* The author wishes to gratefully acknowledge the assistance of Ms. Colette Bart, General Secretary of the CROA, Ms. Ellen E. Mole, the late Mr. A.D. Andrew, Mr. D.V. Brazier, Mr. R. Colosimo, Mr. W.J. Milks, Mr. T. McGrath and Professor J.B. Rose for material and information which they contributed to the preparation of this study.

Introduction

At a time when the cost and delay of the ad hoc system of grievance arbitration in industrial relations have become a subject of growing concern to unions and employers alike, the simplified and accelerated system of arbitration that has served Canada's railway industry for close to 25 years has much to commend it. The shortened procedures and efficiencies of scale realized by the operation of a single permanent office of arbitration, governing a substantial number of employers and unions, under a uniform set of rules, have provided stable and efficient service in this important area of labour relations at a fraction of the cost incurred under the system of ad hoc arbitration commonly utilized in other industries. If the opinions of the consumers of the system are to be believed, their savings in hearing time and cost have not been at the expense of quality, either in the process, in the "bottom line" of adjudicated results, or in the satisfaction of the managers and employees affected.

A visitor to the Canadian Railway Office of Arbitration (CROA) in Montreal on a hearing day will see a process that has little resemblance to the "long form" of arbitration hearing that generally follows the procedures of a civil trial. The CROA system also differs dramatically from "shop floor" arbitration or expedited arbitration resulting in oral, non-precedential rulings. Typically, the waiting room of the CROA will be filled with the parties awaiting their turn for hearing. Cases are heard in French as well as in English, with awards issuing in both official languages and translated copies available for all awards. Normally hearings last between one and two hours, although they are sometimes shorter. Five to seven cases are generally heard in a day, with a written decision, usually from one to four pages in length, normally issuing within the same week. The management and union representatives who present the bulk of the cases are capable and seasoned advocates, well schooled in the procedures and precedents of the CROA. Their participation is central to its success.

The grievances heard are not simply small claims. They range from minor discipline and wage disputes to discharge grievances and cases involving critical contract interpretation, including issues such as work jurisdiction and contracting out, which may have substantial monetary ramifications. All cases are presented in the form of written briefs, described in greater detail below, with thorough documentation appended. In discipline cases the briefs presented contain the record of a relatively elaborate pre-hearing investigation. The decisions of the Office are numbered, printed and published throughout the industry, where they have traditionally been accorded the respect of received law. It appears that of the approximately 2,000 awards issuing from the Office, only five have ever been taken before the courts on judicial review by an employer or union. Students and practitioners of dispute resolution concerned with the stability

and efficiency of arbitration do well to consider the value of this alternative system of labour arbitration.

This examination of the CROA reviews the following:

1. Background: The Canadian Railway Board of Adjustment No. 1
2. Establishment of the CROA
3. Employees and unions who participate in the CROA
4. Hearing procedures
5. Discipline cases
6. Time and cost expended under the CROA compared with ad hoc arbitration

Background

Scholars generally acknowledge that in many respects, particularly in the first half of the 20th century, initiatives in the railway industry in North America were precedent setting in the field of labour dispute resolution.[1] Like so much of the law and practice in contemporary Canadian industrial relations, the Canadian Railway Office of Arbitration traces its earliest roots to wartime. By the turn of the century a number of collective bargaining relationships had been well established between railways and unions in Canada. With the advent of World War I, the governments of both Canada and the United States were concerned that labour disputes not interrupt wartime production or the movement of armaments and supplies vital to the war effort. The Americans moved first, and by General Order No. 13 of the Director General of the United States Railroad Administration, established a bipartite tribunal, the Board of Adjustment No. 1, to settle any disputes between railway workers and their employers.

At the urging of then Minister of Labour, Hon. Senator G.D. Robertson, Canada soon followed suit with the voluntary establishment of the Canadian Railway Board of Adjustment No. 1. Students of history and economics, and those concerned with the effects of contemporary free trade, will be struck by the consistency of practice in the rail industry as between Canada and the U.S. reflected in that early arrangement. The first Report of Proceedings of the Canadian Board, issued on October 12, 1920, records the following account of the origins of that historic agreement and its most notable terms:

On July 26th, 1918, in response to a request made by the Dominion Govern-

[1] See, generally, A.W.R. Carrothers, E.E. Palmer and W.B. Rayner, *Collective Bargaining Law in Canada,* 2nd ed. (Toronto: Butterworths, 1986), pp. 41-55.

ment through the then Acting Minister of Labor, Hon. Senator G.D. Robertson, officials, representative of the various Railways in Canada, and Vice Presidents and General Chairmen from practically all lines in Canada for:

> The Brotherhood of Locomotive Engineers,
>
> The Brotherhood of Locomotive Firemen and Enginemen,
>
> The Order of Railway Conductors,
>
> The Brotherhood of Railroad Trainmen,
>
> The Order of Railroad Telegraphers,
>
> The International Brotherhood of Maintenance of Way Employees

met at the Windsor Hotel, Montreal.

Senator G.D. Robertson, acting as Chairman, explained that the purpose for the call of the meeting was to arrive at an understanding as to the methods to be adopted for the application of the provisions of General Order No. 27 of the Director General of the United States Railroad Administration, to the Railways of Canada, and to also consider and, if possible, arrange for some agreement whereby all differences arising between the Railways and the Employees concerned would be disposed of in a mutually satisfactory manner. . . .

On July 27th, 1918, a Joint Committee, representing the Railways and the Employees' Organizations, met and prepared a tentative draft of a Memorandum of Agreement for the above purpose, such draft being in line with the terms of General Order No. 13 of the United States Railroad Administration, under which Railway Board of Adjustment No. 1 at Washington had been instituted some months previously, the only difference in the draft as proposed being that the language was made applicable as a mutual agreement between the Canadian Railway War Board and the Chief Executives of the six Organizations parties to the proposed agreement. . . .

The Memorandum of Agreement as signed on August 7th, 1918, reads as follows:

> WHEREAS the parties hereto in united desire to avoid disputes or misunderstandings which would tend to lessen the efficiency of transportation service in Canada during the War have resolved upon the appointment of a Board composed of members to be selected as hereinafter prescribed, which shall have full power and authority to determine all differences which may arise between any of the said railways and any of the classes of its employees above mentioned and which shall not be promptly adjusted between the officers and employees of the railway concerned; including the interpretation or application of wage schedules or agreements, and the application to the Railways of Canada of General Order No. 27 of the Director General of the United States Railroad Administration; with authority to make such amendments or additions in line with such amendments or additions as may be made thereto for the railroads in the United States as may be necessary, having due regard to the rights of the several classes of employees and of the railways respectively.
>
> Now therefore it is agreed by and between the parties as follows:
>
> 1. There shall be at once created a Board to be known as Canadian Rail-

way Board of Adjustment No. 1, to consist of twelve members, six to be selected by the Canadian Railway War Board, and compensated by the Railways, and six by the Executive Officers of the Organizations of Employees hereinbefore named, and compensated by such Organizations.

2. The Canadian Railway Board of Adjustment No. 1 shall meet in the City of Montreal within fifteen days after the selection of its members and select a Chairman and a Vice-Chairman, who shall be members of the Board. The Chairman or Vice-Chairman will preside at meetings of the Board, and both will be required to vote upon the adoption of all decisions by the Board.
3. The Board shall meet regularly, at stated times each month, and continue in session until all matters before it are considered.

• • • • •

6. The Canadian Railway Board of Adjustment No. 1 shall render decisions on all matters of controversy arising from interpretations of wage agreements and other matters in dispute as provided in the preamble hereof and when properly submitted to the Board.
7. Wages and hours established by General Order No. 27 of the Director General of the United States Railroad Administration and amendments thereto shall be incorporated into existing agreements on the several railways, and should differences arise between the management and the employees on any of the railways as to such incorporation, such questions or differences shall be decided by the Canadian Railway Board of Adjustment No. 1 when properly presented thereto.

• • • • •

12. In each case an effort should be made to present a joint concrete statement of the facts as to any controversies, but the Board is fully authorized to require information in addition to the concrete statement of facts, and may call upon the chief operating officer of the Railway or the executive officer of the Organization concerned for additional evidence, either oral or written.
13. All decisions of Canadian Railway Board of Adjustment No. 1 shall be approved by a majority vote of all members of the Board.
14. After a matter has been considered by the Board, and in the event a majority vote cannot be obtained, then any six members of the Board may elect to refer the matter upon which no decision has been reached to a referee to be unanimously agreed upon by the Board, and on failure to agree, application shall be made to the Governor-General-in-Council for appointment of a referee whose decision shall be final.

Following the war the Board was continued in existence by a further agreement dated April 15, 1921, and it remained in operation until 1964. The decisions of the Board of Adjustment did not provide reasons. The results of the decisions did, however, set precedential standards that were generally accepted in subsequent like cases throughout the industry. Some of its decisions are relied upon to this day, especially in cases that involve an examination of past practice and bargaining history. Generally speaking, the bipartite Board served the industry well for a period of over 40 years.

In the 1960s, however, a polarization of the Board resulted in tie votes in a growing number of cases. Between 1961 and 1963, the number of such cases created an unacceptable backlog and delay, as increasing resort was had to ad hoc arbitrators, including then Professor Bora Laskin, Judge J.C. Anderson, as well as arbitrators Roger Bisson, C.H. Curtis, André Montpetit and Roger Ouimet. In light of the growing reliance on referees, in 1964 the railways gave notice to the unions of their intention to terminate their participation in the Canadian Railway Board of Adjustment No. 1. The parties then met to negotiate a new arrangement for the final settlement of grievances as was then required by the *Industrial Relations Disputes Investigation Act.*[2]

Establishment of the CROA

A number of concerns motivated the parties in the negotiation of their new arrangement. Of primary importance was the issue of industry expertise and consistency in the arbitration awards that would govern the parties. A second concern was the minimizing of cost and a third, efficiency in the expeditious processing and hearing of grievances.

The importance of consistency from case to case was manifested in the question of whether to retain the services of a single permanent arbitrator to hear all cases, or to follow the practice prevalent in other industries of using a number of different arbitrators. It was finally decided that familiarity with railroading practices and consistency in the interpretation of the many different collective agreements governing the parties would be better served by retaining a single arbitrator to hear and resolve all of the grievances in the industry. The rationale for the permanent arbitrator approach was perhaps best articulated by T.A. Johnstone, Assistant Vice-President of Labour Relations for Canadian National Railways, who, in an industry publication,[3] was quoted as follows:

> The agreement establishing a permanent arbitrator is a first in Canada, although arrangements of this kind have given satisfactory results for many years in the United States in the clothing, automobile and other industries. While ad hoc arbitration has recently been used on the railways in relatively few instances, the selection of arbitrators has been time consuming and difficult . . .
>
> Permanent arbitration . . . has certain intrinsic advantages over the ad hoc variety, which has on occasion been referred to as a "hit and run" system. In the permanent arbitration arrangement the arbitrator must live tomorrow with the decision he wrote today.

In retrospect it can be said that the weight and wisdom of those words have lived on in the ongoing responsibility to the parties and the process

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[2] S.C. 1948, c. 54, s. 19 (now s. 57 of the *Canada Labour Code*, R.S.C. 1985, c. L-2).
[3] *Keeping Track* (September, 1965).

inescapably felt by the four arbitrators who, in turn, have served the CROA in the almost 25 years of its existence. The first arbitrator appointed was His Honour Judge J.A. Hanrahan (1965-1968), followed by Arbitrators J.F.W. Weatherill (1968-1983), D.H. Kates (1983-1986) and this author, each retained on the basis of a one-year contract, renewable upon the agreement of the parties.

The Canadian Railway Office of Arbitration was established on January 7, 1965. In the interest of efficiency, it was agreed from the beginning that the CROA should maintain the office in Montreal, and the services of the full-time General Secretary previously employed by the Canadian Railway Board of Adjustment. Following the pattern of the Board of Adjustment, it was agreed that the arbitrator should sit on a monthly basis 11 months of the year, commencing the second Tuesday of each month, excluding August. The arbitrator hears and disposes of all grievances which have progressed for hearing on the docket in a given month.

The importance of a permanent office staffed by a General Secretary cannot be understated. Dealing as it now does with 12 employers and 7 trade unions, and typically hearing in the order of some 150 grievances each year, the Office could not function without the co-ordinating hand of a full-time administrator to schedule cases, send notices to the parties, prepare and issue awards and tend to the many other budgeting and administrative details of the Office on a day-to-day basis. While these elements may appear at first blush to be a significant cost item, as disclosed below, maintaining a permanent office and General Secretary is intrinsic to the economies of scale and overall efficiencies that make the CROA an alternative that is, in the final analysis, dramatically less costly on a per case basis than the alternative of ad hoc arbitration.

Participants

The CROA was established on January 7, 1965 under the terms of a memorandum of agreement entered into by Canadian National, Canadian Pacific and four major unions representing railway employees. The business of the Office, including the management of its budget and the hiring of the permanent arbitrator, is conducted by a joint committee comprised equally of employer and union representatives, co-chaired by a member from each of the two sides. The memorandum, which was subsequently amended in September of 1971, contains some 21 articles which govern the time and place of the arbitration sittings, the appointment and jurisdiction of the arbitrator, the procedures for processing and scheduling grievances, as well as the rules of the hearing generally.

At present the employer membership of the CROA has grown to comprise 12 companies in the rail, trucking and telecommunications industries, as well as 7 trade unions, with an estimated 45,000 employees being cov-

ered by the collective agreements falling under the jurisdiction of the Office. The chief employers now involved are Canadian National Railways, CP Rail, Via Rail, Algoma Central Railway, Ontario Northland Railway, the Quebec Northshore & Labrador Railway, C.P. Trucks and CNCP Telecommunications. The trade unions involved are the Brotherhood of Locomotive Engineers (B.L.E.), the United Transportation Union (U.T.U.) (representing running trades employees other than engineers), the Canadian Brotherhood of Railway, Transport & General Workers (C.B.R.T. & G.W.), the Brotherhood of Maintenance of Way Employees (B.M.W.E.), the Transportation Communications International Union (T.C.U., formerly the Brotherhood of Railway & Airline Clerks) and the Rail Canada Traffic Controllers.

The only significant segment of railway employees not under the jurisdiction of the CROA are the tradespersons employed in the maintenance and repair of railway equipment, such as carmen, machinists, electricians, sheet metal workers, plumbers and boilermakers. They are separately represented by what are generally referred to as the "shopcraft unions". Notably, although the shopcraft unions arbitrate outside the CROA, their hearings follow a similar abbreviated procedure, utilizing briefs, not infrequently before a current or former CROA arbitrator retained on an ad hoc basis. The Canadian Signals & Communications Union also arbitrates outside the CROA, because the low volume of grievances it handles does not justify the amount it would have to pay. Like the shopcraft unions, however, it follows the CROA procedure and it uses the CROA arbitrator currently in office.

Procedures at the Hearing

The procedures of the CROA are governed by the terms of the memorandum of agreement establishing the Office. Central to the expeditious hearing of the cases is the requirement, inherited from the practice of the Canadian Railway Board of Adjustment No. 1, that at the hearing each party file and read a written brief outlining the facts, arguments and jurisprudence relied on in support of its position. The briefs are filed, however, only after the parties have provided the Office with a written Joint Statement of Issue one month in advance of the hearing, or if they cannot agree, *ex parte* statements.

These requirements, and others which are significant to the process as well as to the arbitrator's jurisdiction, are disclosed in the following parts of the memorandum of agreement establishing the CROA:

> 4. The jurisdiction of the Arbitrator shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of:

(A) disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent, including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and

(B) other disputes that, under a provision of a valid and subsisting collective agreement between such railway and bargaining agent, are required to be referred to the Canadian Railway Office of Arbitration for final and binding settlement by arbitration,

but such jurisdiction shall be conditioned always upon the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this Agreement.

5. A request for arbitration of a dispute shall be made by filing notice thereof with the Office of Arbitration not later than the eighth day of the month preceding that in which the hearing is to take place and on the same date a copy of such filed notice shall be transmitted to the other party to the grievance. A request for arbitration respecting a dispute of the nature set forth in Section (A) of Clause 4 shall contain or shall be accompanied by a Joint Statement of Issue. A request for arbitration of a dispute of the nature referred to in Section (B) of Clause 4 shall be accompanied by such documents as are specifically required to be submitted by the terms of the collective agreement which governs the respective dispute.

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8. The Joint Statement of Issue referred to in Clause 5 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement has been misinterpreted or violated. In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours' notice in writing to the other may apply to the Arbitrator for permission to submit a separate statement and proceed to a hearing. The Arbitrator shall have the sole authority to grant or refuse such application.

9. The Arbitrator shall not decide a dispute without a hearing. At the hearing each party shall submit to the Arbitrator a written statement of its position together with the evidence and argument in support thereof.

10. The parties to a dispute submitted to the Arbitrator may at any hearing be represented by Counsel or otherwise as they may respectively elect.

11. The Arbitrator may make such investigation as he deems proper and may require that the examination of witnesses be under oath or affirmation. Each party to a dispute shall have the right to examine all witnesses called to give evidence at the hearing. The Arbitrator shall not be bound by the rules of evidence and practice applicable to proceedings before courts of record but may receive, hear, request and consider any evidence which he may consider relevant.

12. The decision of the Arbitrator shall be limited to the disputes or questions contained in the joint statement submitted to him by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such issues, conditions or questions. His decision shall be rendered in writing, together with his written reasons

therefor, to the parties concerned within 30 calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute, unless the applicable collective agreement specifically provides for a different period, in which case such different period shall prevail.

The decision of the Arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.

13. Each decision of the Arbitrator which is made under the authority of this Agreement shall be final and binding upon the Railway, the bargaining agent and all the employees concerned.

14. Through the Office of Arbitration, the Arbitrator shall report the decision in each case and the reasons for such decision to all signatories hereto.

The requirement of written briefs and supporting documentation is critical for the successful operation of the CROA system. In this author's experience, in the ad hoc stream of arbitration, parties will too often come to a hearing inadequately prepared, tending to shape their case as the hearing proceeds, depending on what the other party puts forward. The result can be unproductive delays for objections and adjournments as lawyers confer with their clients, often to be briefed on an unanticipated fact or development in the adversary's case. A major premise of the CROA system is that arbitration is not the place for courtroom gamesmanship and that grievances should be judged on their genuine merits. The system reflects a conviction that the goal is more readily achieved if the parties are required to define the issues in advance, in writing, and likewise to commit to writing, in a joint statement that defines the arbitrator's jurisdiction, the facts that are agreed to constitute the basis of their dispute.

Time saving is also promoted by the rule that the parties must put their full case between two covers of a brief before they come to the hearing. As the highest appellate courts have long realized, nothing begets clarity and precision in the presentation of facts and arguments so much as the requirement that they be reduced to writing in a relatively brief form. A brief is typically 10 to 20 pages long and contains the history of the dispute, the facts pertinent to the grievance, the provisions of the collective agreement that are in issue and the position of the party, in the form of its argument, including reference to arbitral or court precedents, statutes and railway operating rules, often in the form of federal regulations, that may be pertinent. Exhibits are filed as appendices to the brief, thereby allowing ready access to all necessary documentation.

At the hearing witnesses may be called, but this is done exceptionally. In many cases, particularly those that do not involve discipline, the grievor and local management do not attend the hearing. As a general rule, the decision to hear evidence under oath is reserved until after both parties have presented their briefs. At that point the material points of fact which

are not agreed upon are more clearly identified, and the testimony of witnesses can be limited to those facts that bear on the merits of the grievance and which are clearly in dispute.

The fact-finding efficiency of the CROA system is impressive. Too often the award in an ad hoc arbitration will, in a case that has consumed one or more days of oral testimony, begin with the paradoxical observation: "The material facts are not in dispute." The CROA system forces the parties to make that discovery on their own, before the hearing, and not at its conclusion. The resulting difference in time and cost expended is significant.

The parties read their briefs at the hearing, usually referring the arbitrator to the appended exhibits which can be examined in greater detail after the hearing. Each is also allowed the opportunity for comments in rebuttal of the other's brief. Advocates whose initial tendency is to think that it is pointless to read briefs aloud at a hearing, because the arbitrator can always read them on his or her own, generally come to revise their initial skepticism and accept the value of reading the briefs, or at least speaking extemporaneously from the brief, as is frequently done in interest arbitrations.

There are compelling reasons for having the brief read aloud at the hearing. First, the arbitrator typically hears up to 17 grievances at a monthly sitting. These are presented continuously over a period of three days, running normally from 9 a.m. to 5 p.m., with the awards generally issuing within a few days of the hearing. Individual case hearings are normally one to two hours long. The need for the adjudicator to focus on the material and to digest it in a short time is therefore paramount. With written briefs being read, the likelihood of rambling, repetitious argument is minimized, as are the chances of the arbitrator misunderstanding what a party is attempting to say. Joint simultaneous review of the brief also gives the arbitrator the fullest opportunity to identify and seek clarification of points of fact or argument that are unclear or difficult to grasp. The importance of note taking by the arbitrator, with its possible distractions, is also reduced, giving the adjudicator greater freedom to concentrate on the position being presented.

The preparation of a brief before the hearing gives the lay union or management advocate the prior opportunity to consult with legal counsel on the content of the brief. If they choose, parties can have the benefit of the fullest legal advice in preparing their brief, although most cases are presented by union and management representatives. The briefs also have some practical historic value. Because the decisions of the CROA are precedential, the briefs filed in all cases are kept in the records of the Office. While in the normal stream of arbitrations the adjudicator is limited to examining the arbitrator's final award for the purposes of precedent, it is accepted within the CROA that the arbitrator may have recourse to the full

file in a prior case if doing so will give a better understanding of the basis and scope of the decision. This is particularly helpful given the brevity of CROA awards. For example, if a prior award of reinstatement relies on an employee's record as a reason for the decision without elaborating the details of the record, that information remains available by reference to the briefs contained in the earlier case file.

Discipline Cases

Persons accustomed to ad hoc arbitration may, understandably, question how discipline cases can be disposed of through this form of abbreviated proceeding. They can scarcely believe, for example, that the entire hearing of the grievance of a conductor discharged after the collision and derailment of two trains at Hinton, Alberta in 1987 causing 23 fatalities, took only two and a half hours.

The answer to that question lies in understanding the pre-hearing fact-finding procedures that have become part of the CROA system. In the railway industry a collective agreement generally contains a provision for a formal investigation to be conducted by the employer in any case that may result in a serious measure of discipline. In addition to providing a form of pre-discipline discovery for both parties, the investigation is of obvious assistance to the employer in an industry whose employees often work unsupervised and away from their home terminal.

The investigation conducted by the employer must be fair and impartial. The collective agreement usually provides procedural protections to the employee, including written notice of the subject of the investigation, the right to be represented through his or her union, the right to be informed of all evidence against the employee and to offer evidence in rebuttal. All statements and documents received in such investigations are recorded by the presiding company officer, usually in the form of a question and answer transcript. The decision of the company with respect to discipline is then based on the content of the investigation. It includes any written statements received from supervisors, employees or other witnesses, along with the transcript of questions and answers compiled at the investigation hearing. It can also include pertinent documents, such as train orders or time records, which are appended to it as exhibits. At the arbitration stage the entire record of the investigation is placed before the arbitrator, usually as an exhibit appended to the parties' briefs. The body of the brief then makes reference to the record of the investigation to support the position which the respective parties are advancing.

Because of the thoroughness of the investigation process and the completeness of the record tabled at the CROA hearing, the need for oral evidence at the arbitration stage is substantially reduced. Where there is a point of obvious conflict in the factual account given by two witnesses at

the investigation stage, it remains open to the parties to bring the persons involved to the hearing to testify and be cross-examined under oath. Again, such testimony is generally confined to the specific factual dispute arising out of the transcripts. Alternatively, the parties may prefer to allow the consistency and credibility of the statements of the witnesses to be judged by the arbitrator on the basis of the transcripts and documents alone. For example, the statement of an employee to the effect that he or she was not on duty at a given time and place may be rebutted by the contrary statement of three employees and two supervisors buttressed by the employee's own signed time card, all of which may be presented to the arbitrator in a documentary form.

The importance of this form of fact finding in discipline cases is no less critical to the efficiency of the CROA system than the requirement of written briefs. The use of a pre-arbitration investigation procedure, resulting in a transcript for use in common at the arbitration hearing, transfers the burden of evidence taking to a less costly and more informal setting. Considering how long the investigations can be, particularly where events are complex and a number of witnesses are examined, the resulting saving in time and money to the parties at the arbitration hearing is significant, although allowance must be made for the fact that the investigation is initiated and controlled by the employer.

Compiling the transcript of a pre-hearing examination is not without precedent as a means of fact finding in the field of industrial relations. For many years labour relations boards, faced with the issue of determining whether the duties and responsibilities of certain individuals should place them within a given bargaining unit, or whether they are employed in a managerial or confidential capacity, have referred the initial evidence-taking process to subordinate board officers. The board officer or examiner conducts an examination of selected employees respecting their duties and responsibilities, giving the fullest opportunity to the parties to put their questions to the persons examined. The resulting transcript of the officer's examination is then placed before the labour board, and the parties are given an opportunity at a board hearing to argue their case based upon its contents. Just as in the case of the labour relations board, the use in the CROA of a preliminary or subordinate fact-finding process frees the arbitrator from hearing large volumes of peripheral evidence, allowing the parties and the adjudicator to focus on the pertinent parts of the resulting transcript and to concentrate more expeditiously on the critical points of the dispute. A positive by-product of the system of recorded disciplinary investigations is the frequency of cases in which the parties are able to determine, well in advance of the arbitration hearing, that there is little or no disagreement between them on the facts. As a result, in many cases the issue is narrowed, without dispute, to arguing the disciplinary result that is appropriate in light of the facts.

The efficiency of the CROA's handling of grievances in discipline cases is particularly noteworthy. As most practitioners of labour arbitration know too well, it is not unusual for the hearing and argument of a discharge case in the ad hoc stream of arbitrations to require a number of days of hearings, not infrequently spread out over several months or, in some cases, years. In ad hoc arbitrations the hearing process is followed by a further delay pending the arbitrator's award. The CROA alternative, which usually disposes of discipline and discharge cases in one to two hours, with the arbitrator's decision normally issuing within a few days, is arguably more in keeping with the original concept of labour arbitration as an expeditious and relatively inexpensive way to resolve employees' grievances and settle union-management disputes. Nor is there any perceptible variance in the success rate of grievances as between the two systems. An analysis of CROA case outcomes over the long term reveals no significant variation from the pattern of outcomes disclosed in labour arbitrations generally.[4]

Comparisons Between the CROA and Ad Hoc Arbitration

It is, of course, difficult to quantify with any precision the relative value of two or more systems of grievance arbitration. Intangibles such as employer, employee and union satisfaction with a given set of procedures and the sense of productivity and accomplishment experienced by an arbitrator functioning within a system are factors that are not susceptible of precise calculation. An examination of empirical data does, however, permit the rough quantification and comparison of the more objective elements of time and expense that are of ongoing significance to anyone concerned with the cost, efficiency and effectiveness of systems of labour arbitration.

What does an analysis of the time taken for the hearing and disposition of an arbitration under the CROA reveal as compared to arbitrations in the traditional ad hoc stream? The largest part of my arbitral practice involves ad hoc arbitrations. A review of all types of cases which I read during a recent calendar year discloses that the average ad hoc arbitration case heard to completion in that period required two days of hearings. Further research suggests that my experience is in keeping with that of other arbitrators. For the purposes of this study I conducted an examination of all ad hoc arbitration awards involving discipline cases filed in the Office of Arbitration of the Ontario Ministry of Labour for the period of nine months ending January 31, 1989. The sample, which excluded privately expedited cases or cases expedited under the provisions of section 45 of the Ontario *Labour Relations Act*,[5] totalled 150 awards. The average

[4] See, *e.g.*, G.W. Adams, *Grievance Arbitration of Discharge Cases* (Kingston: Queen's University Industrial Relations Centre, 1978).

[5] R.S.O. 1980, c. 228.

length of hearing for the cases surveyed was 1.8 days, which for all practical purposes means a hearing time and cost to the parties of 2 days.

The available data therefore indicates that the average arbitration heard in the "normal" way requires two days of hearing. As noted above, CROA cases are heard, almost without exception, in one to two hours, at a rate of five to seven cases in a day. In the past three years only one CROA case, a particularly complex grievance involving an allegation of sexual harassment and an unusual number of witnesses, was adjourned to a second day of hearing for its completion. (In that case the parties consented to the second day of hearing being scheduled outside the normal CROA sittings to avoid delays to the regular docket.)

Generally speaking, the time for processing a grievance from the precipitating incident to the date of the award is roughly the same under the CROA as in ad hoc cases.[6] For the reasons related above, however, the time utilized by the parties under the CROA in the pre-arbitration stage is generally more productive. The process of disciplinary investigations, for example, means that the parties have to expend greater time and effort in dealing with a case before it gets to the arbitration stage. The fruit of their effort is an abbreviated hearing which results in remarkable cost savings, which in turn keeps the system more accessible to grievances. Moreover, under the CROA the parties remain more directly in charge of their disputes because of their own greater hands-on involvement both before and at the arbitration stage. Cost accountability is less likely to be surrendered to the decisions of outside consultants or legal counsel.

Precise cost comparisons are difficult to make. There are obviously hidden costs in any system of grievance arbitration. The time spent by management and union personnel in pre-hearing disciplinary investigations in the CROA system is a cost item to be considered. On the other hand, the brevity of the hearing, with the reduced involvement of both management, union staff and witnesses at the arbitration stage, represents a considerable saving. By the same token, participants in ad hoc arbitration are also required to spend some time in pre-arbitration investigations and meetings. As consumers of the ad hoc system are well aware, the time spent by managers, union staff and employee witnesses in hearings which, on average, take two days, and in some cases can take much more, also represents a significant cost factor.

A further expense item of major importance which it is impossible for me to quantify and compare is the cost to the parties of legal counsel. In my own ad hoc practice lawyers present the parties' case in the great majority of arbitrations. By comparison, as noted above, the substantial majority of cases heard in the CROA are not pleaded by lawyers.

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[6] See J.B. Rose, "Statutory Expedited Grievance Arbitration: The Case of Ontario" (1986), 41 Arbitration Journal, No. 4, p. 30, at 43-44.

Certain dollar comparisons can, however, be made as regards the cost of arbitration itself, disregarding the expense of lawyers and staff time or employee time expended both in preparation and at the hearing. In that sense, it is possible to make some assessment of the comparative cost of the arbitration system itself, on a per case basis. In fiscal 1987-88 the CROA heard and disposed of 141 grievances. The expenses of the Office for that year, including the arbitrator's fees and expenses, the salary of the General Secretary, rent and all incidental office and printing expenses, totalled $182,638. This represents an average arbitration cost of $1,295 per case, borne in equal shares by the employers and unions participating in the CROA, according to a rateable cost-sharing and budgeting formula worked out internally among themselves.

How does the cost of arbitration in the ad hoc stream compare? Based on a daily arbitrator's fee of $1,700, an average case requiring two days, including hearing room rentals, travel expenses, photocopying, telephone charges and other incidental disbursements, can represent a total cost to the parties of $4,400, also shared equally. On this basis of calculation, which this author believes is conservative, the average cost of hearing a single case under the CROA system is roughly 29.4 per cent of the cost of the typical ad hoc arbitration. In other words, consumers of the CROA service spend less than one-third of what is spent by parties who purchase arbitration services on an ad hoc basis.

The fact that the CROA's costs are budgeted for a given one-year period also functions as an incentive to greater efficiency. The more cases that can be heard, the lower the unit cost to the parties. For example, in a recent year 161 cases were heard, yielding an even lower per case cost ratio. While the parties are dedicated to giving each grievance the hearing time that it fairly needs, the reality of a fixed annual budget gives them still greater reason to avoid deleterious procedures and to make every effort to keep the system moving smoothly.

The foregoing cost comparison does not, of course, take into account the additional factor of cost predictability and the distorting impact of single cases that become particularly protracted under the ad hoc system. Under the CROA system the parties know with some certainty, in advance, what their arbitration will cost them, as long as the procedural rules of the Office are faithfully applied. Cancellation costs are also avoided; if one or more cases on the docket should settle, others will always proceed. In the ad hoc stream predictability is much less certain. Apart from the problems of unpredictable settlements and cancellations, unions and employers alike are all too familiar with the runaway arbitration, where a case initially expected to take one or two days extends into a hearing of five, ten or even more days. I have been made aware of a single protracted multi-day ad hoc arbitration whose final cost to the employer, including

the expenses of legal counsel, exceeded the entire budget of the CROA for a single year.

The lower cost per arbitration of the CROA system has a significant impact on the issue of access to justice. While the CROA docket attempts to give priority to discharge cases, it must ultimately accommodate all grievances filed. Because of the low unit cost of CROA arbitrations, unions are able to process to arbitration substantial numbers of wage claims (many of which are referred to in the industry as "time claims") as well as the most minor of disputed discipline cases. Claims of $200 or less are not unknown. In my experience, cases of that kind, which do involve a felt wrong of some importance to the grieving employee, rarely find their way to final arbitration in the ad hoc stream, because it is simply too costly to have them heard. In the result, an analysis of the overall value of the CROA system must include an appreciation of the responsiveness of that system to the ultimate hearing and disposition of substantial numbers of minor claims, a consideration that should not be minimized in terms of its impact on overall industrial relations stability and employee morale.

Conclusion

There are many distinguishing features of the Canadian Railway Office of Arbitration. In summary form, the following are among the most noteworthy:

- ongoing policy and administrative control of a joint union-management committee
- consistency and accountability of a single permanent arbitrator
- efficiency in scheduling, record keeping, publication of awards and overall administration by maintaining a permanent office and full-time General Secretary
- cost predictability and control through annual budgeting
- permanent monthly scheduling, three consecutive days with five to seven cases per day
- substantial hands-on involvement of parties in pre-hearing procedures, preparation and presentation of cases
- fact-finding assistance to both parties and arbitrator through pre-hearing disciplinary investigations
- clear definition of facts, issues and positions by requirement of joint statement of issue and written briefs
- seasoned advocacy, chiefly by union and management representatives
- hearings and awards in both official languages of Canada
- short time lapse between the arbitration hearing and the award

- industry-wide publication of all awards
- avoidance of cancellation costs
- cost savings by reduced use of witnesses and a pre-hearing fact-finding process
- substantial cost savings on a per case basis due to reduced length of hearing
- accessibility to arbitration for minor grievances because of the lower unit cost of arbitration
- full file records of all past cases including briefs and awards
- general ongoing control of the parties over all aspects of their own grievance and arbitration procedures

Grievance arbitration is an indispensable part of the Canadian system of collective bargaining. In a very real sense, for employers and unions alike, arbitration is the forum of last resort for industrial relations justice. No institution of dispute resolution, whether it be the courts or statutorily mandated systems of private arbitration, can maintain respect and credibility if it is not efficient and responsive to the needs of the constituency it is meant to serve. Students and practitioners of industrial relations who share that conviction, and who have concerns about the cost, delays, accessibility and overall efficiency of their own system of arbitration should appreciate why employers and unions in the rail industry are convinced that where arbitration is concerned, the CROA system truly is a better way to run a railway.

Arbitration Procedures

9.49 Subject to the following exceptions, all grievances shall be heard in conformity with the regular arbitration procedure. Grievances concerning termination of employment including release for incapacity grievances (10.10), grievances that concern the unit as a whole or the Union as such, grievances concerning employees in more than one area, and policy grievances shall be heard in the formal procedure.

Regular Arbitration Procedure

9.50 The regular arbitration procedure is an informal and accelerated mechanism to facilitate a more speedy settlement of grievances arising out of the application of the collective agreement.

9.51 The grievances will be assigned to the arbitrators on the area list in the chronological order of the date in which they were referred to arbitration pursuant to clause 9.34. A modification may be brought to the chronological order to allow the hearing of a grievance in a location other than the location where it was presented.

9.52 The Union shall forward to the Corporation a list of the grievances to be heard on the day or days scheduled for the hearing of grievances according to the regular arbitration procedure.

The aforementioned list shall be forwarded to the Corporation no later than thirty (30) working days in advance of the hearing.

9.53 To ensure the efficiency of the regular arbitration procedure, the parties agree that a reasonable number of grievances must be dealt with by each arbitrator for each of the days of hearings set aside. The parties agree that the scheduled number of cases to be heard shall not be less than twenty-five (25), if warranted by the inventory.

9.54 If at the time of the forwarding of such list there exists a delay greater than six (6) months between the referral date of a grievance in the regular procedure inventory and the scheduled date of hearing of said grievance at the location, the Union shall then be entitled to identify for hearing the first three (3) cases of every group of ten (10) cases to be heard without respecting the FIFO rule. The Union shall continue to be so entitled for the subsequent lists until such time as the above described delay ceases to be greater than six (6) months.

9.55 The parties shall meet at least one week prior

to the arbitration hearing in order to exchange a copy of any document they intend to use during the arbitration, including precedents and authorities.

9.56 The parties shall, in collaboration, establish and attempt to agree on the facts relevant to each grievance.

9.57 The meeting described above is also for the purpose of reviewing grievances and settling as many of them as possible.

9.58 The parties shall make every reasonable attempt to minimize the use of witnesses in the regular arbitration procedure.

9.59 Once the list provided for in clause 9.52 has been forwarded, the parties may agree that other grievances in abeyance and raising similar issues to the issues raised by the grievances scheduled to be heard can be amalgamated to be heard simultaneously.

9.60 Any other grievances including discharge cases may also be heard in accordance with the regular arbitration procedure if the parties so agree.

9.61 The other provisions of this collective agreement shall fully apply to regular arbitration except to the extent they are modified by the provisions of clauses 9.58 and 9.62 to 9.70 hereinafter.

9.62 As soon as possible prior to the date of hearing, each party shall forward to the other party and to the arbitrator a copy of any document that it intends to use during the hearing, including precedents and authorities. Each party may also forward to the other party and to the arbitrator a brief statement of the issue in dispute.

9.63 The parties agree not to use lawyers to represent them in regular arbitration.

9.64 The parties may agree at any time to commence or pursue the hearing of a grievance in accordance with the formal arbitration procedure. At the request of a party, the arbitrator may rule that a grievance is of such an exceptional nature that it should be referred to the formal arbitration procedure.

9.65 The arbitrator must hear the grievance thoroughly before rendering a decision on a preliminary objection unless he or she can dispose of this objection at once.

9.66 The hearing shall be conducted in the most informal and expeditious way that is possible according to the nature of the grievances and all circumstances.

9.67 Unless both parties agree, no written

submission, precedent or authority shall be delivered to the arbitrator after the hearing.

9.68 Whenever possible, the arbitrator shall deliver his or her decision orally at the conclusion of the hearing in giving a brief resume of his or her reasons and confirm his or her conclusions in writing thereafter.

When the decision is not delivered orally at the conclusion of the hearing, the arbitrator shall render it in writing as soon as possible thereafter with a brief resume of his or her reasons.

9.69 Subject to clause 9.68, the arbitrator acting in the regular arbitration procedure shall not be subject to clause 9.101.

9.70 The decision of the arbitrator shall not constitute a precedent and shall not be referred to in subsequent arbitrations. Clause 9.103 shall not apply to such decision.

9.71 The parties may at any time agree not to follow any of the rules outlined in clauses 9.62 to 9.70.

Formal Arbitration Procedure

9.72 The Union shall forward to the Corporation a list of the grievances to be heard, the names of the arbitrators assigned and the date(s) of hearing for each. The list shall be made in keeping with the chronological order in which the grievances were referred to in the area on a first in first out basis, and each case shall be scheduled in that order for the first available date of hearing of the month, according to the availability of the arbitrators.

9.73 The aforementioned list shall be forwarded to the Corporation no later than thirty (30) working days in advance of the hearing.

9.74 Where a grievance is scheduled to be heard at the formal arbitration procedure, the Union shall notify in writing the arbitrator of the appropriate list who, in accordance with the rules established in clause 9.39, must act. At the same time, the Union shall forward a copy of the notice to the Corporation. The notice shall also identify the location of the hearing and the language in which the hearing shall be conducted.

9.75 If, at the time of the forwarding of such list, there exists a delay greater than six (6) months between the referral date of a grievance in the area formal process inventory and the scheduled date of hearing of said grievance in the area, the Union shall then be entitled to identify for hearing the first two (2) cases of every group of

ten (10) cases to be heard without respecting the FIFO rule. The Union shall continue to be so entitled for the subsequent lists until such time as the above described delay ceases to be greater than six (6) months.

9.76 The notices hereinabove mentioned shall also fix one or more days of hearing among the days set apart by the designated arbitrator. The hearing of the grievance shall then commence and be pursued on the day or days so fixed unless the arbitrator decides for serious reasons to postpone the hearing to another day.

National Formal Arbitration

9.77 Grievances to be heard by the arbitrators appearing on the national list will be assigned in the chronological order in which they were referred to arbitration, unless otherwise agreed to by the parties.

9.78 Where more than one grievance is referred to an arbitrator, the concerned party determines the order in which the grievances will be heard.

9.79 At least thirty (30) working days in advance of the hearing, either party shall forward to the other party a list of the grievances to be heard, the names of the arbitrators assigned and the date(s) of hearing for each. The notice shall identify the location of the hearing and the language in which the hearing shall be conducted.

9.80 The notices hereinabove mentioned shall also fix one or more days of hearing among the days set apart by the designated arbitrator. The hearing of the grievance shall then commence and be pursued on the day or days so fixed unless the arbitrator decides for serious reasons to postpone the hearing to another day.